

APPEAL NO. 050021
FILED FEBRUARY 22, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 30, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant notified his employer of that work-related injury within 30 days, therefore the appellant (carrier) is not relieved of liability for the _____, injury; and that the claimant had disability beginning on December 17, 2003, and continuing to September 1, 2004. The carrier appealed, arguing that the determinations of the hearing officer were against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed in part as reformed and reversed and remanded in part.

COMPENSABLE INJURY AND DISABILITY

We have reviewed the complained-of determinations regarding whether the claimant sustained a compensable injury and whether he had disability beginning December 17, 2003, and continuing to September 1, 2004, and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's implied finding that the claimant sustained an injury while in the course and scope of employment while disconnecting a heavy hose at work and his finding that due to the _____, injury the claimant has been unable to obtain and retain employment earning the equivalent to his preinjury wage beginning on December 17, 2003, and continuing to September 1, 2004, are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We note that the hearing officer's decision contains a typographical error referencing December 7, 2003, rather than December 17, 2003, in conformity with Finding of Fact No. 6, Conclusion of Law No. 5 and the evidence presented at the CCH. We reform Finding of Fact No. 6 to correct a typographical error and conform to the evidence presented at the CCH as well as both Conclusion of Law No. 5 and the decision. Finding of Fact No. 6 is reformed to reflect that the disability continues to September 1, 2004, rather than September 9, 2004.

TIMELY NOTICE

Sections 409.001(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs and that the notice may be given to an employee of the employer who holds a supervisory or

management position. Section 409.002 provides, in part, that the failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the carrier have actual knowledge of the injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to provide notice in a timely manner. An employee who fails to give the employer notice of the injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The test for good cause is that of ordinary prudence, that is, whether the employee has prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). It has also been held that the existence of good cause must generally continue up to the time the otherwise untimely report of injury is made, although an immediate reporting is not required. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Whether an employee has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the fact finder. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met, and the reason for delay will generally be found in the claimant's own testimony. See Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ).

In the case at hand, the 30th day after the claimed injury was (30 days after date of injury). The hearing officer found that the claimant notified his supervisor of the _____, work-related injury within 30 days of that injury. Although the hearing officer did not make a specific finding of fact concerning the date the injury was reported to the employer, the hearing officer states in the Background Information section of the decision and order that "[a]fter seeing a nurse practitioner on [30 days after date of injury] he was advised to inform his employer of the injury and to pursue a workers' compensation claim. The next day he told his supervisor that he had hurt himself on _____...." It appears that the hearing officer believed that the claimant reported the injury on (31 days after date of injury), which is 31 days after his injury.

We reverse the hearing officer's determination that the claimant notified his employer of his _____, work-related injury within 30 days and remand this issue back to the hearing officer for additional findings. The hearing officer should make a specific finding of fact concerning the date the injury was reported to the employer based on the evidence previously presented at the CCH. If the date found is outside the 30 day period then the hearing officer should make additional findings regarding whether or not good cause exists for the failure to report the injury within the required 30 day period. Based on these findings, the hearing officer should then determine whether or not the carrier is relieved of liability in accordance with Section 409.002. Compensable injury is defined in Section 401.011(10) as an injury that arises out of and in the course and scope of employment for which compensation is payable. The existence of disability is dependent upon the existence of a compensable injury. Section 401.011(16). Therefore, although we have affirmed the implied finding that the claimant

sustained an injury on _____, while in the course and scope of his employment and the finding that due to the _____, injury, the claimant has been unable to obtain or retain employment earning the equivalent to his preinjury wage beginning on December 17, 2003, and continuing to September 1, 2004, whether the claimant has a compensable injury and disability is dependent upon the issue of timely notice.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge